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V.G., Appellant)	
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and)	Docket No. 20-1520
)	Issued: September 21, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. COAST GUARD INTEGRATED SUPPORT)	
COMMAND, Portsmouth, VA, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

³ The Board notes that, following the August 14, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,060.43, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period September 1, 2017 through November 9, 2019 without appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On May 8, 2007 appellant, then a 51-year-old machinist, filed a traumatic injury claim (Form CA-1) alleging that on April 23, 2007 he sustained a low back injury when he removed and installed couplings on a boat while in the performance of duty. He stopped work on May 1, 2007. OWCP accepted the claim for herniated nucleus pulposus at L4-5, laminectomy syndrome, recurrent lumbar disorders of the sacrum, and subacute L5 radiculopathy with ongoing axonal damage. It paid appellant wage-loss compensation on the supplemental rolls beginning September 24, 2007 and on the periodic rolls beginning July 6, 2008.

In claims for compensation (Form CA-7) for disability from work for the period October 10, 2007 through June 20, 2008, appellant indicated that his retirement coverage was under the Federal Employees Retirement System (FERS).

On September 26, 2019 OWCP provided SSA with a FERS/SSA dual benefits calculation form.

On October 9, 2019 SSA completed the dual benefits calculation form, which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from September 2017 through December 2018. Beginning September 2017, the SSA rate with FERS was \$1,082.50 and without FERS was \$931.40. Beginning December 2017, the SSA rate with FERS was \$1,104.20 and without FERS was \$950.00. Beginning December 2018, the SSA rate with FERS was \$1,135.00 and without FERS was \$976.50.

On October 21, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from September 1, 2017 through October 12, 2019. It found that he received an overpayment of compensation in the amount of \$453.30 for the period September 1 through November 30, 2017, in the amount of \$1,855.48 for the period December 1, 2017 through November 30, 2018, and in the amount of \$1,651.19 for the period December 1, 2018 through October 12, 2019. The total overpayment was determined to be \$3,959.97.

On October 22, 2019 SSA completed a dual benefits calculation form, which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from September 2017 through December 2018. Beginning September 2017, the SSA rate with FERS was \$1,532.20 and without FERS was \$1,142.70. Beginning December 2017, the SSA rate with FERS was \$1,562.80 and without FERS was \$1,165.50. Beginning December 2018, the SSA rate with FERS was \$1,606.50 and without FERS was \$1,198.10.

In a memorandum of telephone call (Form CA-110) with an OWCP representative dated November 5, 2019, SSA confirmed that appellant had FERS coverage, but that there was an error in the figures originally submitted, and that they would return a corrected form.

On November 5, 2019 OWCP received a revised dual benefits calculation form from SSA, which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from September 2017 through December 2018. Beginning September 2017, the SSA rate with FERS was \$1,142.70 and without FERS was \$1,024.70. Beginning December 2017, the SSA rate with FERS was \$1,165.50 and without FERS was \$1,045.10. Beginning December 2018, the SSA rate with FERS was \$1,198.10 and without FERS was \$1,074.30.

In a memorandum to the file dated November 15, 2019, an OWCP claims examiner noted that there were inconsistencies between the two SSA/FERS worksheets dated October 9 and 22, 2019, and that OWCP could not pursue preliminary debt actions at that time as clarification from SSA as to the correct information was needed. The overpayment totaling \$3,959.97 was voided effective November 15, 2019.

On November 15, 2019 OWCP received an October 29, 2019 dual benefits calculation form from SSA which indicated that beginning September 2017 appellant's SSA rate with FERS was \$1,532.20 and without FERS was \$1,142.70. Beginning December 2017, the SSA rate with FERS was \$1,562.80 and without FERS was \$1,165.50. Beginning December 2018, the SSA rate with FERS was \$1,606.50 and without FERS was \$1,198.10.

On November 18, 2019 OWCP again provided SSA with a FERS/SSA dual benefits calculation form for recomputation. It noted that SSA had advised that there was error in the calculations previously provided to OWCP.

On November 20, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from September 1, 2017 through October 12, 2019. It found that he received an overpayment of compensation in the amount of \$1,168.50 for the period September 1 through November 30, 2017, in the amount of \$4,780.70 for the period December 1, 2017 through November 30, 2018, and in the amount of \$4,631.53 for the period December 1, 2018 through November 9, 2019. The total overpayment, before deducting any payments to the debt already made, was calculated as \$10,580.72. OWCP noted that \$146.31 had already been deducted from appellant's continuing compensation for the period October 13 through November 9, 2019. Thus, it deducted this figure from his total overpayment, to arrive at a final total overpayment amount of \$10,434.41. An OWCP representative noted "Correct OP?" beneath this final total overpayment amount. Attached to the FERS offset calculation worksheet were the October 9 and 22, 2019 FERS/SSA worksheets.

In a manual adjustment form dated November 20, 2019, OWCP adjusted appellant's overpayment based on corrected SSA/FERS calculations for the period October 13 through November 9, 2019. It calculated a net difference of \$230.37. Attached to the form was the October 21, 2019 FERS offset calculation worksheet, which calculated a total overpayment of \$3,959.97 for the period September 1, 2017 through October 12, 2019.

On November 25, 2020 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$10,580.72 had been created because appellant received SSA age-related retirement benefits based upon his federal service, without appropriate offset, at the same time he received FECA wage-loss compensation for the period September 1,

2017 through November 9, 2019. It explained that the overpayment occurred because his compensation was not reduced by the FERS/FECA amount. OWCP found appellant without fault in the creation of the overpayment and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Attached to the preliminary determination was the October 22, 2019 FERS/SSA worksheet. OWCP afforded appellant 30 days to respond.

In a Form CA-110 dated November 26, 2019, OWCP noted that appellant and a representative of SSA had participated in a conference call on that date. The SSA representative advised that appellant was a FERS-covered employee and that, as such, part of his SSA benefits came from his FERS contributions. The SSA representative further advised that the correct calculations of appellant's FERS offset were dated May 11, 2019 and received by OWCP on November 5, 2019. OWCP advised appellant that it would recalculate all figures and correct his offset deductions with regard to the overpayment based on the FERS/SSA worksheet received on November 5, 2019.

In a memorandum to the file dated November 27, 2019, an OWCP claims examiner noted that, based on the conference call of November 26, 2019, the overpayment totaling \$10,580.72 was voided effective November 27, 2019.

In a letter dated November 27, 2019, OWCP notified appellant that, based on information provided by SSA regarding the amount of his age-related retirement benefits which were attributable to federal service, his FECA wage-loss compensation had been adjusted. It stated that OWCP had determined the SSA/FERS offset identified in prior notifications was incorrect. OWCP noted that this letter superseded the notices dated October 21 and November 19, 2019.

On November 27, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA overpayment from September 1, 2017 through October 12, 2019 in the amount of \$3,206.74. It found that he received an overpayment of compensation in the amount of \$354.00 for the period September 1 through November 30, 2017, in the amount of \$1,448.77 for the period December 1, 2017 through November 30, 2018, and in the amount of \$1,403.97 for the period December 1, 2018 through November 9, 2019. OWCP based its FERS offset calculation on the dual benefits calculation form received from SSA on November 5, 2019.

On January 27, 2020 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$3,206.74 had been created because appellant received SSA age-related retirement benefits based upon his federal service, without appropriate offset, at the same time he received FECA wage-loss compensation for the period September 1, 2017 through November 9, 2019. It credited him for \$146.31 deducted for the period October 13 through November 9, 2019 for a remaining debt balance of \$3,060.43. OWCP explained that the overpayment occurred because appellant's compensation was not reduced by the FERS/SSA amount. It found him without fault in the creation of the overpayment and forwarded an overpayment action request form and a Form OWCP-20. OWCP requested that appellant provide supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income and expenses. Attached to the preliminary determination was the FERS/SSA worksheet received on November 5, 2019. OWCP stated that, during preliminary debt processing, it had noted separate documents from SSA, and that, in a conference call on November 26, 2019, SSA clarified the correct FERS/SSA figures. It afforded appellant 30 days to respond.

On February 7, 2020 appellant contested the occurrence of the overpayment.

A telephonic prerecoupment hearing regarding the preliminary overpayment determination of January 27, 2020 was held on June 3, 2020. Appellant testified regarding his monthly income, expenses, and assets.

In a Form OWCP-20 dated June 3, 2020, appellant listed his monthly income as \$1,072.00 in SSA benefits and monthly expenses totaling \$2,825.00. His assets included \$2,820.00 in cash on hand, as well as in checking and savings accounts. Appellant submitted supporting financial information for his SSA benefits, which noted that the type of his SSA benefits was monthly retirement benefits.

By decision dated August 14, 2020, an OWCP hearing representative finalized OWCP's preliminary overpayment determination of January 27, 2020, finding that appellant received an overpayment of compensation in the amount of \$3,060.43 for the period September 1, 2017 through November 9, 2019 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for that period without appropriate offset. The hearing representative found that, when appellant's FECA compensation of \$2,841.91 was added to his SSA benefits, appellant's income exceeded his monthly expenses by \$1,305.19. The hearing representative denied waiver of recovery of the overpayment and required recovery by deducting \$200.00 every 28 days from appellant's ongoing compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.⁶ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,060.43 because he concurrently received FECA wage-loss compensation and SSA age-related

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

retirement benefits for the period September 1, 2017 through November 9, 2019 without appropriate offset.

The record indicates that, while appellant was receiving wage-loss compensation under FECA, he also received SSA age-related retirement benefits attributable to his federal service during the relevant period. A claimant cannot receive both compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ Consequently, the fact of the overpayment has been established.

To determine the amount of the overpayment, the portion of SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA on November 5, 2019 with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS and without FERS for specific periods September 1, 2017 through November 9, 2019. In a November 26, 2019 conference call, an SSA representative advised that appellant was a FERS-covered employee and that, as such, part of his SSA benefits came from his FERS contributions. The SSA representative further advised that the correct calculations of appellant's FERS offset were received by OWCP on November 5, 2019. OWCP provided its calculations of the amount that should have been offset during the relevant period based on information provided by SSA for the period September 1, 2016 through December 7, 2019 in its December 19, 2019 preliminary overpayment determination. In this preliminary determination, it found that an overpayment of compensation in the amount of \$3,206.74 had been created, and credited appellant for \$146.31 taken for the period October 13 through November 9, 2019 for a remaining debt balance of \$3,060.43. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period September 1, 2017 through November 9, 2019 and finds that an overpayment of compensation in the amount of \$3,060.43 was created.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰ Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434

⁸ See *D.M.*, Docket No. 19-1369 (issued June 30, 2020).

⁹ See *L.W. supra* note 6; *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. § 10.438.

to 10.437 of OWCP's regulations.¹² Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expense, and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹³ For waiver of recovery of the overpayment under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹⁴ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ It considered his financial information to determine if recovery of the overpayment would defeat the purpose of FECA.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. OWCP found that, after its review of the documents of record, he had total current monthly income of \$3,913.91 and total monthly expenses of \$2,608.72, which left \$1,305.19 of disposable income with which to repay the debt. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.¹⁷

As appellant failed to establish that, recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.¹⁸

¹² *Id.* at §§ 10.434-10.437.

¹³ *Id.* at § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at § 10.436.

¹⁷ *See M.C.*, Docket No. 19-0699 (issued February 12, 2020).

¹⁸ *Supra* note 13.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁹

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors so as to minimize hardship.²⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation.

The record supports that, in requiring repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information he submitted as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. Therefore, OWCP properly required recovery of the overpayment by deducting \$200.00 from his continuing compensation every 28 days.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,060.43, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits for the period September 1, 2017 through November 9, 2019 without appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$200.00 from his continuing compensation payments every 28 days.

¹⁹ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²⁰ *Id.*

²¹ *See J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board